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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 JANE LABORDE,) CASE NO. C05-0829-RSM
08)
09 Plaintiff,)
10)
11 v.) REPORT AND RECOMMENDATION
12) RE: SOCIAL SECURITY
JO ANNE B. BARNHART, Commissioner) DISABILITY APPEAL
of Social Security,)
Defendant.)
_____)

13 Plaintiff Jane LaBorde proceeds through counsel in her appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's application for Supplemental Security Income (SSI) and Disability Insurance (DI)
16 benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's
17 decision, the administrative record (AR), and all memoranda of record, it is recommended that this
18 matter be REMANDED for further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1956.¹ She completed the tenth grade and did not attain a
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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

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01 GED. Plaintiff received training as a certified nurse's assistant. Her past work experience includes
02 employment as a certified nursing assistant, an occupational therapy assistant, a physical therapy
03 assistant, and a laborer.

04 Plaintiff applied for SSI and DI in August 2001, alleging disability since April 13, 2001 due
05 to hepatitis C, depression, pain disorder, and left eye blindness. Her application was denied
06 initially and on reconsideration, and she timely requested a hearing.

07 An ALJ held a hearing on May 4, 2004, taking testimony from plaintiff and a vocational
08 expert, Olof Elofson. (AR 515-564.) On July 26, 2004, the ALJ issued a decision finding plaintiff
09 not disabled. (AR 15-26.)

10 Plaintiff appealed the ALJ's decision. On March 12, 2005, the Appeals Council denied
11 plaintiff's request for review. (AR 5-7.) Plaintiff appealed this final decision of the Commissioner
12 to this Court. The parties agree that the matter should be remanded for further administrative
13 proceedings as set forth below.

14 **JURISDICTION**

15 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

16 **DISCUSSION**

17 The Commissioner follows a five-step sequential evaluation process for determining
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
19 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
20 engaged in substantial gainful activity since her alleged onset date. At step two, it must be

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22 official policy on privacy adopted by the Judicial Conference of the United States.

determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's hepatitis C, depression, pain disorder/somatoform disorder and blindness in the left eye to be severe impairments. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed impairments. If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform simple, repetitive tasks with limited public and co-worker contact, and was exertionally limited to light work, thus precluding a return to her past work. She has no binocular vision. If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Based on the testimony of a vocational expert, the ALJ concluded there were a significant number of jobs in the national economy plaintiff could perform and, therefore, that she was not disabled.

Vocational Testimony

The parties agree that certain errors at step five of the sequential evaluation process require remand and reconsideration.

1. Vision

One of plaintiff's severe impairments is blindness in her left eye. (AR 17.) In posing a hypothetical, however, the ALJ apparently misspoke and, although noting plaintiff had been blind in the left eye since childhood, asked the vocational expert to assume binocular vision. (AR 559.) Although the error might seem obvious, it is not appropriate to assume the vocational expert

01 correctly understood the hypothetical, because the expert testified, in response to the hypothetical,
02 that plaintiff could perform the job of bottling-line attendant, a position that requires “frequent use
03 of depth perception.” *Dictionary of Occupational Titles* 920.687-042 (4th ed. 1991).

04 2. Consistency with Dictionary of Occupational Titles (DOT)

05 The ALJ found that plaintiff “has no transferable skills from any past relevant work and/or
06 transferability of skills is not an issue in this case.” (AR 25.) The second job the vocational expert
07 found appropriate for plaintiff to perform was assembler, DOT job number 782.684-058 (AR
08 560), with a Specific Vocational Preparation Level (SVP) of 3. However, a job with an SVP of
09 3 is semi-skilled, not unskilled work, *see* Social Security Ruling (SSR) 00-4p, and, therefore, in
10 conflict with the ALJ’s finding that plaintiff did not have transferrable skills. The vocational expert
11 either identified the assembler job in error, or had in mind an assembler job that departed from the
12 DOT’s description of the job. If the latter is the case, the record does not include either a
13 “reasonable explanation” for the inconsistency between the job as proposed and the job as
14 described in the DOT, *id.*, or “persuasive evidence” to support the deviation, *Johnson v. Shalala*,
15 60 F.3d 1428, 1425 (9th Cir. 1995).

16 The step five finding that plaintiff was capable of performing other significant work lacks
17 the support of substantial evidence. If additional vocational evidence is obtained on remand, the
18 ALJ should assure that any conflict with the DOT is reasonably explained.

19 Opinion of Examining Psychologist

20 The parties agree that the ALJ should re-evaluate the opinion of Dr. Frank Hammer, an
21 examining psychologist. Dr. Hammer performed three examinations of plaintiff for the state
22 agency, as well as a report and examination following the administrative hearing at the request of

01 plaintiff's attorney. (AR 171-83, 492-510.) Where not contradicted by another physician, a
02 treating or examining physician's opinion may be rejected only for "clear and convincing" reasons.
03 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where contradicted, a treating or examining
04 physician's opinion may not be rejected without "'specific and legitimate reasons' supported by
05 substantial evidence in the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722
06 F.2d 499, 502 (9th Cir. 1983)).

07 In discussing Dr. Hammer's opinions, the ALJ stated:

08 I give no weight to his conclusions for the following reasons. First, Dr. Hammer is
09 somewhat the psychologist *du jour* of late for this law firm, with his reports nearly
10 universally commissioned by Counsel in support of disability applications, with a
11 universal finding of profound limitations, which certainly detracts from the weight to
12 be given such opinions in any given case. *Saelee v. Chater*, 94 F.3d 520 (9th Cir.
13 1996), *cert. denied*, 519 U.S. 1113 (1997). Specifically, the final evaluation at Exhibit
14 13F was sought by Counsel and performed *after* the hearing, meaning Dr. Hammer
had a read of the entire proceedings and could adjust his conclusions accordingly, in
favor of the claimant. This examination was not in an attempt to seek treatment for
symptoms, but rather, through Counsel referral and in connection with an effort to
generate evidence for the current appeal. Further, he was presumably paid for the
report. Although such evidence is certainly legitimate and deserves due consideration,
the context in which it was produced cannot be entirely ignored. *Saelee, supra*.

15 (AR 21.)

16 A determination that utilizes speculation founded on information outside the record
17 deprives a claimant of the ability to cross-examine or rebut the assumptions relied on, and is
18 impossible to review on appeal. *Burkhart v. Barnhart*, 856 F.2d 1335, 1341 (9th Cir. 1988). *See*
19 *also Miles v. Chater*, 84 F.3d 1397, 1399-1401 (11th Cir. 1996) (remanding a case to a different
20 ALJ because of comments that a doctor's determinations "almost invariably" were favorable to
21 the claimant's attorney's clients). Furthermore, "in the absence of other evidence to undermine
22 the credibility of a medical report, the purpose for which the report was obtained does not provide

01 a legitimate basis for rejecting it.” *Reddick v. Chater*, 157 F.3d 715, 727 (9th Cir. 1998). Plaintiff
02 also raises other criticisms of the ALJ’s treatment of Dr. Hammer’s report, arguing that the timing
03 and consistency of the report enhanced, rather than detracted from, its weight, *see* 20 C.F.R. §
04 404.1527(d)(4), that the ALJ failed to identify any actual improprieties in the preparation of the
05 report, and that the ALJ erroneously stated that Dr. Hammer’s opinions lacked objective support
06 and erroneously discounted Dr. Hammer’s consideration of her physical condition in formulating
07 his opinion.

08 On remand, the ALJ should reevaluate Dr. Hammer’s opinions based on legally sufficient
09 grounds.

10 Evaluation of Mental Condition

11 Another issue on which the parties agree is that, on remand, the ALJ should follow 20
12 C.F.R. §§ 404.1520a and 416.920a when evaluating plaintiff’s mental condition, rating the severity
13 of her mental impairments by evaluating pertinent symptoms, signs, and laboratory findings that
14 substantiate the presence of the impairment(s), and rating the degree of functional limitations in
15 the four broad functional areas: activities of daily living; social functioning; concentration,
16 persistence, or pace; and episodes of decompensation.

17 Credibility Assessment of Plaintiff

18 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
19 reject a claimant’s testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See*
20 *also Thomas*, 278 F.3d at 958-59. In finding a social security claimant’s testimony unreliable, an
21 ALJ must render a credibility determination with sufficiently specific findings, supported by
22 substantial evidence. “General findings are insufficient; rather, the ALJ must identify what

01 testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81
02 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her
03 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."
04 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the
05 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
06 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
07 and third parties concerning the nature, severity, and effect of the symptoms of which he
08 complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

09 The parties agree that the ALJ should reassess plaintiff's credibility upon remand.

10 Assignment to Different ALJ

11 The Appeals Council should determine the assignment of the case on remand.

12 CONCLUSION

13 For the reasons described above, this matter should be REMANDED for further
14 administrative proceedings. A proposed order accompanies this Report and Recommendation.

15 DATED this 10th day of February, 2006.

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17 Mary Alice Theiler
18 United States Magistrate Judge
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